

PEARSON, J.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

STATE OF OHIO,	)	
	)	CASE NO. 4:11CV1809
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
JEFFREY B. JONES, <i>etc.</i> ,	)	
	)	
Defendant.	)	
	)	
UNITED STATES OF AMERICA	)	
obo KEVIN IRELAND and	)	
JAY GEBHART,	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	<b><u>AND ORDER</u></b>
Respondents.	)	[Resolving ECF Nos. <a href="#">3</a> and <a href="#">4</a> ]

After notice to the parties (*see* [ECF No. 5](#)), the Court held a Telephone Conference on September 15, 2011. Deputy Law Director Dan T. Pribich and Assistant U.S. Attorney Kent W. Penhallurick and Heather Tonsing Volosin, along with Chief of the Criminal Division David A. Sierleja, participated in the conference.

Respondents Kevin Ireland and Jay Gebhart, Special Agents for the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) were involved in the arrest of Defendant Jeffrey B. Jones aka Jeffery B. Jones, leading to criminal proceedings against him. On August 10, 2011, Plaintiff the State of Ohio issued subpoenas to Special Agents Ireland and Gebhart commanding their appearance at a preliminary hearing scheduled for August 17, 2011 at 10:15 a.m. in the case captioned *State of Ohio v. Jeffrey B. Jones, etc.*, Case No. 11-CRA-1605, then

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pending before the Youngstown Municipal Court, Youngstown, Ohio. *See* [ECF No. 1-1 at 1-2](#).

On August 17, 2011, a Show Cause Order was issued by the Honorable Elizabeth A. Kobly, Administrative/Presiding Judge of the Youngstown Municipal Court, in Case No. 11-CRA-1605. *See* [ECF No. 1-1 at 3](#). Special Agents Ireland and Gebhart were required to appear on August 29, 2011 “to show cause as to why they should not be held in contempt of court” for failure to timely appear at the preliminary hearing. *Id.*

On August 26, 2011, the United States of America, on behalf of Special Agents Ireland and Gebhart, removed the Show Cause Order and contempt proceeding to this Court pursuant to [28 U.S.C. § 1442\(a\)\(1\)](#). *See* Notice of Removal ([ECF No. 1](#)).

The Court has reviewed Respondents’ Motion to Stay Hearing ([ECF No. 3](#)), filed on August 29, 2011; the Joint Motion to Vacate Show Cause Order ([ECF No. 4](#)), filed on September 9, 2011 by Plaintiff and Respondents; and, has read the file. The Court has also considered the oral statements of counsel offered during the Telephone Conference. For the reasons set forth below, the Joint Motion to Vacate Show Cause Order ([ECF No. 4](#)) is granted and Respondents’ Motion to Stay Hearing ([ECF No. 3](#)) is denied as moot. The Court vacates the Show Cause Order ([ECF No. 1-1 at 3](#)) issued by Judge Kobly on August 17, 2011 in the case captioned *State of Ohio v. Jeffrey B. Jones, etc.*, Case No. 11-CRA-1605, then pending before the Youngstown Municipal Court.

Although Special Agents Ireland and Gebhart admittedly did not arrive at the scheduled time for the preliminary hearing, they did appear and testify at the hearing on August 17, 2011 at the Youngstown Municipal Court. Judge Kobly found that there was probable cause that the

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crime alleged or another felony had been committed, and that Defendant Jones committed it. Therefore, the matter was bound over to the Mahoning County, Ohio Court of Common Pleas for further action by the grand jury. See [ECF No. 3-1 at 3](#). Moreover, Special Agents Ireland and Gebhart possess colorable federal defenses. Sovereign immunity and the ATF's federal regulations preclude enforcement of the state court subpoena and corresponding order in the first instance. [28 C.F.R. §§ 16.21-16.29](#) (governing the disclosure of official information by employees and agents of the United State Department of Justice); [Metcalf v. Ultimate Systems, Ltd.](#), 346 F.Supp.2d 950, 952 (N.D. Ohio 2004) (vacating the motion to show cause because “[u]nder *Touhy*, ‘the state is without jurisdiction to independently compel the testimony or production of documents when it is contrary to a valid [federal] agency regulation. . . . a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid agency regulations.’”) (quoting [Edwards v. United States Dep’t of Justice](#), 43 F.3d 312, 316-17 (7th Cir. 1994)); [United States v. Williams](#), 170 F.3d 431, 433-34 (4th Cir. 1999); [Swett v. Schenk](#), 792 F.2d 1447, 1451-52 (9th Cir. 1986); [United States ex rel. Touhy v. Ragen](#), 340 U.S. 462 (1951). Furthermore, the Court was pleased to be informed at the Telephone Conference that Deputy Law Director Pribich, City Prosecutor Joseph (Jay) R. Macejko, and Assistant U.S. Attorney Sierleja will meet with Judge Kobly this Thursday, September 22, 2011, to discuss this matter and the steps that have been taken to secure the timely appearance of ATF agents in the future when their testimony is necessary in the Youngstown Municipal Court.

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The Clerk is directed to issue a courtesy copy of this Memorandum of Opinion and Order by regular mail to the Honorable Elizabeth A. Kobly, Administrative/Presiding Judge, Youngstown Municipal Court, 26 South Phelps Street, 2nd Floor, Youngstown, Ohio 44503.

IT IS SO ORDERED.

September 16, 2011  
Date

/s/ Benita Y. Pearson  
Benita Y. Pearson  
United States District Judge